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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

SEGMENT SYSTEMS TECHNICAL STAFFING, INC., Plaintiff and Appellant, v. EDGE SOFTWARE, INC., Defendant and Respondent.	H021896 (Santa Clara County Super. Ct. No. CV773686)

Plaintiff, Segment Systems Technical Staffing, Inc. (Segment) sued defendant, Edge Software, Inc. (Edge) for breach of contract. Segment, an employment recruiting firm, claimed that Edge failed to pay Segment's fee when it hired a software engineer that Segment had referred. The trial court found that Edge never hired the engineer and entered judgment for Edge. Segment appeals. We will affirm.

FACTS

Segment and Edge entered into an agreement under which Segment was to refer potential candidates for employment to Edge (Fee Agreement). The pertinent portions of the Fee Agreement were the following:

"A. Fee Structure: You will pay us a fee of 25% of the candidate's first year's salary for any candidate referred by us hired by you or your affiliate. . . . [¶] B. Terms: All fees are earned and due at the first day of a candidate's employment and must be paid

within ten days after that date. . . . If payment is not made as agreed, we reserve the right to void our guarantee and collect our normal fee of 30%."

Edge was looking for a software engineer. Segment sent Edge many resumes, but the first one that Edge found appropriate was the one belonging to Tony Rojko. Edge president, James Sylvester interviewed Rojko and decided to offer him a job. On Friday, April 3, 1998, Sylvester gave Rojko a letter proposing terms of employment (Offer Letter). The offer was to remain open for one day only. The short timeframe was included only as a result of pressure from Segment, not because Edge had any other potential programmers lined up.

The Offer Letter included three provisions that bear on our discussion. The first appeared within the body of the letter:

"Confidential Information. You agree that your employment is contingent upon your execution of, and delivery to EDGE Software of [a Confidentiality Agreement] in the standard form utilized by EDGE Software."

The second pertinent provision was located in the last paragraph:

"Please acknowledge and confirm your acceptance of this letter by signing and returning the enclosed copy of this offer letter, and the Confidentiality Agreement as soon as possible."

Beneath the signature block there appeared the following:

"ACCEPTANCE: [¶] I accept the terms of my employment with EDGE Software as set forth herein."

Rojko signed the letter on Monday, April 6, 1998, but he did not sign the Confidentiality Agreement. He asked Sylvester for some more time to prepare a list of his own inventions so that they could include it as part of the Confidentiality Agreement. Sylvester agreed. That same day Segment faxed an invoice to Edge claiming a fee of $27,500, due in 10 days.

Rojko spent around 25 to 30 hours at the Edge facilities over the course of the week of April 6, 1998. He did not do any work for Edge, but spent the time chatting with the marketing and sales people. Sylvester was wondering why it was taking him so long to get the Confidentiality Agreement back to him. He got to thinking that what Rojko was doing was "re-interviewing" Edge personnel. On the following Monday, April 13, 1998, Rojko told Sylvester he had decided he did not want to work for Edge because he thought its technology was obsolete. Rojko departed, agreeing that Edge did not owe him anything. He never did sign the Confidentiality Agreement.

On April 17, 1998, because Edge had not paid the first invoice, Segment sent a second invoice, now claiming $33,000. Edge refused to pay and this lawsuit ensued.

DISCUSSION

The sole question presented is whether the trial court was correct in determining that Edge had not "hired" Rojko within the meaning of the Fee Agreement. Interpretation of the Fee Agreement and the Offer Letter is a question of law which we review de novo. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) "However, determination of whether there is a contract is a question of fact requiring deference to the trial court. [Citation.] In such a case, we will defer to factual findings made by a trial court when there is oral or written evidence to support such findings. [Citation.]" (*In re First Capital Life Ins. Co*. (1995) 34 Cal.App.4th 1283, 1287.)

The Fee Agreement states that Edge will pay a fee for any candidate it "hired" and that the fee is earned and due on the candidate's "first day of employment." Although the Fee Agreement did not define either the term "hired" or the phrase "first day of employment," to be hired or to be employed is generally understood to require an underlying agreement between the employer and the employee. (See *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (1976) 59 Cal.App.3d 647, 652.) Thus, Rojko was "hired" for purposes of the Fee Agreement if he and Edge entered into an agreement for his employment. The trial court effectively found that Edge and Rojko had not reached

an agreement, holding that the Confidentiality Agreement was a "condition precedent to the employment," and since Rojko never signed it he had not been hired.

Segment contends that Rojko was hired by Edge because an employment contract was formed when Rojko signed the Offer Letter. According to Segment, the clause that stated employment was "contingent upon" execution of the Confidentiality Agreement was a condition subsequent, and did not prevent formation of the contract. Segment ignores the last clause in the body of the letter that required acceptance by signing both documents. As is the case with any contract, an employment agreement requires mutual assent demonstrated by a valid offer and unqualified acceptance. (See Civ. Code, §§ 1550, 1565.) If the offer prescribes a condition "concerning the communication of its acceptance" then the offeror is not bound unless the condition is satisfied. (Civ. Code, § 1582; *Kessinger v. Organic Fertilizers, Inc.* (1957) 151 Cal.App.2d 741, 750.) In this case, execution of the Confidentiality Agreement was such a condition. No agreement could have been reached unless the condition was satisfied or waived. (*Sabo v. Fasano* (1984) 154 Cal.App.3d 502, 505.)

To determine whether a binding agreement was reached, we examine the surrounding facts and circumstances. (See *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358 and cases cited therein.) Segment argues that Sylvester's conduct shows that he presumed that Edge had hired Rojko because he treated him like a new employee, and exercised control over him at all times. The only evidence in the record to support this contention is Sylvester's testimony that he gave Rojko the new employee paperwork to complete. Sylvester exercised control over Rojko only to the extent that he prevented Rojko from accessing the company's source code. Although Sylvester agreed during cross-examination that Rojko had "accepted" his offer of employment, our analysis on that point is driven not by his subjective understanding but by the express language of the offer. "[T]he outward manifestation or expression of assent is controlling [citation], and . . . what the language of [an instrument] means is a

'matter of interpretation for the courts and not controlled in any sense by what either of the parties intended or thought its meaning to be. . . .' [Citation.]" (*Citizens Utilities Co. v. Wheeler* (1957) 156 Cal.App.2d 423, 432.)

The plain language of the Offer Letter made execution of the Confidentiality Agreement a condition for creation of the contract. The final paragraph under which Rojko place his name stated, "I accept the terms of my employment . . . as set forth herein." The terms set forth therein specified that "employment is contingent" on execution of the Confidentiality Agreement, and that acceptance was to be communicated by signing the letter and the Confidentiality Agreement. Rojko signed the letter on a Monday but asked for more time before signing the Confidentiality Agreement. He then spent some time at the Edge facilities, but he did no work, and received no orientation or training during that time. All he did was fill out paperwork and gather information about the company. Sylvester asked him daily when he was going to sign the Confidentiality Agreement. Finally, when Rojko decided that he did not want to work for the company, he so informed Sylvester and departed, agreeing that he was not owed any money. This evidence amply supports the trial court's conclusion that the parties did not intend a contract to be formed until Rojko's signed the second document.

When Edge received a second invoice from Segment after Rojko left, Sylvester retained Tom E. Wilson, an attorney with the law firm of Morrison & Foerster. Wilson's office sent a letter to Segment on April 21, 1998, informing it that Edge did not intend to pay the fee. The letter stated that Rojko had been employed by Edge but resigned. Segment argues that the letter should be binding on Edge as an admission, citing Evidence Code section 1222. Evidence Code section 1222 merely makes the statement admissible as an exception to the hearsay rule. The trial court admitted the letter, and as a result the letter was evidence which the court " 'may believe as against other evidence, including the party's own contrary testimony on the stand.' " (*Boogaert v. Occidental Life Ins. Co.* (1983) 150 Cal.App.3d 875, 881.) Sylvester testified that he did not see the

letter before it was mailed, and that he did not understand the approach his attorneys were taking because he did not consider that Rojko had ever been employed by Edge. This is substantial evidence in support of the trial court's determination that the letter was not binding on Edge.

Segment claims that the execution of the Confidentiality Agreement was a condition subsequent and that we add an implied condition to the Fee Agreement if we hold that Edge did not hire Rojko unless the contingencies of the employment agreement were met. The argument presumes that the employment contract was formed in the first place. However, even if a contract had been formed, the Fee Agreement does not cause a fee to be owed until the candidate's "first day of employment." Rojko did no work, received no training, never went on payroll, and was not paid. Consequently, even if we presume Edge and Rojko had reached an agreement, Rojko never had the first day of employment necessary to trigger a fee under Segment's Fee Agreement.

CONCLUSION

As the trial judge concluded, a software engineer and software source code is a "volatile combination." No prudent software company would allow the two to mix without a protective agreement. In this case, Edge used its Confidentiality Agreement to protect its source code. Its offer to Rojko expressly made employment contingent upon execution of the Confidentiality Agreement, and it required that Rojko communicate his acceptance by signing it. Since Rojko did not sign it, he never communicated acceptance and, no contract of employment was ever formed. Accordingly, Edge did not "hire" Rojko, and no fee was due Segment for the referral.

DISPOSITION

The judgment is affirmed.

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Premo, Acting P.J.

WE CONCUR:

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Elia, J.

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Mihara, J.